No. 12819

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CELSO HERNANDEZ ARZAGA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

ERNEST A. TOLIN,
United States Attorney,
WALTER S. BINNS,
Chief Assistant U. S. Attorney,
RAY H. KINNISON,
Assistant U. S. Attorney,
HERSCHEL E. CHAMPLIN,
Assistant U. S. Attorney,
600 U. S. Post Office and Court House Building, Los Angeles 12, California,
Attorneys for Appellee.

FILED
APR - 3 1951
PAUL P. O'BRIEN, CLERK

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 12819

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CELSO HERNANDEZ ARZAGA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Jurisdictional Statement.

Jurisdiction of the matter appealed from herein lay in the United States District Court, for the Southern District of California, Southern Division, under Section 2255 of Title 28, United States Code. The cause having been tried in that Court originally, a motion was made in that Court and filed August 31, 1950, for correction of Judgment and sentence under Section 2255 of Title 28, United States Code [R. 11 to 13, incl.]. Said Motion to Correct Judgment and Sentence was denied by Honorable Ben Harrison, District Judge on September 11, 1950 [R. 15]. A Notice of Appeal from said denial was filed December 27, 1950, based upon authority of the same Section 2255 of Title 28, United States Code [R. 19 to 21, incl.].

The District Court had jurisdiction to try the case under 18 U. S. C. (new) Section 3231. The United States Court of Appeals has jurisdiction over appeals from all final decisions of the District Court, except where direct review is authorized by statute to the Supreme Court and the authority is 28 U. S. C. Sec. 1291.

Statement of the Case.

Facts.

The appellant was indicted by the Federal Grand Jury for the Southern District of California, August 4, 1948, July, 1948, term, in two counts, charging first the importation from Mexico into the United States of one five-tael can of prepared smoking opium, a narcotic drug, contrary to law and in violation of Section 174, Title 21, United States Code; second, the receiving, transportation, and concealment, after importation, of said norcotic drug, the five-tael can of prepared smoking opium, which had been imported into the United States from Mexico, as the defendant well knew, and contrary to law, in violation of the same section and title of the United States Code [R. 2-3].

Appellant Arzaga was charged jointly with one Tom Clark as defendants. Both were tried jointly and found guilty on both counts by verdict of a jury on October 8, 1948, in the District Court for the Southern District of California, Southern Division, at San Diego, California [R. 8]. Defendant Clark was sentenced to serve three years on each count and remanded to the custody of the Attorney General, the two sentences to run concurrently.

Appellant Arzaga was sentenced on October 8, 1948, to serve three and one-half years on each count, the two sentences to run consecutively [R. 9-10]. This appellant made a Motion to Correct Judgment and Sentence and said motion was denied as set forth in Jurisdictional Statement.

The grounds for correction of the Judgment and Sentence submitted to the District Court were substantially the same as those advanced herein upon appeal from the Court's denial of appellant's motion [R. 12 to 13, incl.]. Appellant's position in the lower court as here is first, that he was a victim of double jeopardy in being convicted on two counts of an indictment arising out of one transaction, and became subject to double punishment, contrary to the Fifth Amendment of the Constitution, because, he contends the same evidence was necessary to prove and establish either or both offenses [R. 12 and 13, also App. Br. p. 2].

Questions Involved.

I. Whether Conviction and Sentence on two separate Counts of an Indictment charging importation of a Narcotic Drug contrary to Law and Concealment after such importation constitutes Double Jeopardy in violation of the Constitution?

II. Whether or not different Evidence is required to prove two Counts of an Indictment which charges illegal importation and concealment and transportation after such importation so as to render the Fifth Amendment inapplicable?

III. Whether or not Separate Sentences for offenses charged under separate Counts, first that of importation contrary to law, and second, the Concealment after such importation, constitutes Double Punishment?

ARGUMENT.

Summary.

The contention of the appellant in this case that he was a victim of double jeopardy is without merit. The law is well settled in this Circuit and it appears to be the prevailing majority rule in other jurisdictions that where an indictment charges two or more counts, based upon a statute which authorizes more than one offense, the fact that a defendant, convicted of more than one count at the same trial, does not violate the Fifth Amendment to the Constitution. The Morgan case cited by the appellant points out that Congress has the sole authority to define and enumerate criminal offenses and it has clearly done so in the case of the statute involved here. Both the illegal importation of a narcotic drug and the transportation or concealment after such illegal importation are defined as separate offenses.

The appellant next raises the question as to whether or not the same evidence is required to prove both counts of an indictment under the statute. Such is not the case as different elements are involved in each count and a simple analysis of the requirements to prosecute and prove each count demonstrates the fallacy of this premise. Apparently, his theory is based upon the line of cases that hold that the test of double jeopardy is that where the evidence is required to prove one indictment and a defendant is later charged and tried for a similar offense the courts generally do not allow a second prosecution where the evidence is the same. As stated above, the two counts were separate and distinct and this Court has so held on similar occasions in the past.

The third point raised by the appellant raises the issue of double punishment. He contends that inasmuch as he

has almost completed punishment on the first count, the Court should relieve him of punishment and sentence on the second count, which was made to run consecutively by the trial court. Again, there is no merit to this position as the courts have held again and again where there are distinct and separate counts, separate punishments may be imposed for each and every offense. It was so held in the *Morgan* case cited by the appellant and decided by the Supreme Court. It is submitted that the other cases cited by the appellant are to be distinguished or do not support the position taken by the appellant. The order of the lower court denying his motion to correct judgment and sentence should, therefore, be affirmed.

POINT I.

Conviction and Sentence on Both Counts of an Indictment That Charges Illegal Importation of a Narcotic Drug and Concealment After Such Importation, Does Not Constitute Double Jeopardy in Violation of the Constitution.

At the outset it may be observed that the record discloses no other appeal perfected by this appellant from the Judgment of the court below. There is no showing of an unfair trial, nor was there any motion made for a new trial. Thus, appellant urges his cause before this Court of Appeals for the first time upon an issue of law urging in effect that the court below was in error by refusing to vacate the Judgment, and set aside or correct the sentence, especially that imposed on the second count.

Section 2255 of Title 28, United States Code, does provide for such a remedy provided the sentence imposed was in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to im-

pose such sentence, or that the sentence was in excess of the maximum authorized by law.

The claim of appellant Arzaga that the sentence imposed upon the two counts of this indictment violates the guarantee of the Constitution against double jeopardy is without merit. The law in this jurisdiction appears to be well settled on this point as applied to the case presented here. In the recent case of *Shafer v. United States,* 1950, 179 F. 2d 929, this court held that an appeal based upon such grounds was frivolous and was therefore dismissed.

The defendant there was indicted with others on three counts. The first was for receiving after importation of a narcotic drug, knowing it to have been imported contrary to law. The second, that he knowingly purchased a narcotic drug which was not in or from the original stamped package. The third, charged all defendants with conspiracy to import and receive this narcotic drug into the United States from Mexico. The trial court dismissed Counts 2 and 3 during trial. This court said on page 930 that the dismissal was not inconsistent with entry of judgment on Count 1, even if the same element was involved in each of the three. It said further that even a verdict of acquittal on the last count and of guilty on the first would be sustained, since a verdict need not be consistent, citing *Dunn v. United States,* 284 U. S. 390, and *Robinson v. United States,* 9 Cir. 175 F. 2d 4, 10. This Court further said that if the transaction was the same in all three counts, still a like result would follow for actually neither the incidents of Count 1, nor the crime attempted to be charged were the same as those set out in either Count 2 or Count 3.

In the *Shafer* case, under the question of double jeopardy, the case of *Barsock v. United States* was cited, 9

Cir., 177 F. 2d 141, together with other cases therein at page 143.

In that case this court held there was no merit in appellant's contention that where murder was charged in two counts and one dismissed during the trial, the appellant had been once in jeopardy.

In the last paragraph of the opinion on page 143, 177 F. 2d, we find the restatement of the law in this jurisdiction on the point in question as follows:

> "This court has held that a dismissal of one count, where the indictment charges the same offense in two counts, even after all the evidence is in, does not operate as a bar to the subsequent indictment for the same offense. Craig v. United States, 9 Cir., 81 F. 2d 816, 819, certiorari denied, Weinblatt v. United States, 298 U. S. 690, 56 S. Ct. 959, 80 L. Ed. 1408, rehearing denied Craig v. United States, 299 U. S. 620, 57 S. Ct. 6, 81 L. Ed. 457; O'Malley v. United States, 8 Cir., 128 F. 2d 676, 684; cf. Dunn v. United States, 284 U. S. 390, 393, 52 S. Ct. 189, 76 L. Ed. 356, 80 A. L. R. 161. In the Craig case an earlier trial had resulted in the discharge of the jury for failure to agree after the defendant had successfully moved for a dismissal of one of the two counts charging the same offense. On a second trial for the same offense, the defendant's plea of former jeopardy was overruled by the trial court, and this court affirmed. Assuming that the same offense is charged in both counts of the indictment in the present case, if a second trial would not be barred, *a fortiori,* a submission of the first count to the jury in the same trial would not violate appellant's right not to be placed twice in jeopardy for the same offense."

Also, it was held that a trial on consolidated indictments for unlawfully selling, receiving and concealing morphine, was not double jeopardy in *Silverman v. U. S.* (C. C. A. Mass. 1932), 59 F. 2d 636, cert. den. 53 S. Ct. 89, 287 U. S. 640.

Therefore it is submitted that no question of double jeopardy is present in law or fact here as appellant was convicted and sentenced on two counts of an indictment wherein he was charged with first having imported a narcotic drug, namely smoking opium into the United States from Mexico, contrary to law, and second, having received, concealed, and facilitated the transportation and concealment after importation of said opium, which had been imported contrary to law.

POINT II.

Evidence Required to Prove All Essential Elements of One Count of an Indictment Charging Illegal Importation Would Not Be the Same as That Necessary to Prove Concealment of a Narcotic Drug After Importation Contrary to Law.

A. Two or More Separate and Distinct Offenses Are Defined Within the Statute Which Contain Different Elements and Require Separate Proof.

The appellant contends that since both counts of the indictment in which he was charged are based upon the same statute, Title 21 United States Code, Section 174, and that importation contrary to law was charged in count one, and concealment of the opium after importation is charged in count two, the same evidence is required to prove both counts. A simple legal analysis demonstrates the contrary. First, the government had to prove that he did knowingly import the opium into the United States from Mexico con-

trary to law. Secondly, it had to prove that he concealed, received and facilitated the transportation and concealment *after* the opium had been imported to establish the offense under count two.

The statute enumerates several possible offenses connected by the word OR, which could be committed by one defendant and charged in separate counts of one indictment. The evidence would not be the same in order to prove any two counts. In the instant case, the second offense would not be possible until the first had been committed. Different witnesses, different documents, and a new set of circumstantial evidence might be required to establish the concealment or transportation. In the first, the proof that opium was brought across the border by the appellant, a false declaration to Customs Officials, the absence of authority to bring it in would have to be proved. In the second count, evidence that he received the opium from some third person, the fact that he concealed it or secreted it to avoid its detection, or transportation from one point to another within the United States after importation, would establish guilt.

The appellant is apparently confused by the rule of law that where it is necessary in proving one offense to prove every essential element of a former offense growing out of the same act, conviction of the former is a bar to prosecution for the latter. Authority for this rule may be found in the case of *Krench v. United States,* 42 F. 2d 354. This principle does not apply here.

In the *Krench* case the appellant contended that Counts One and Two were duplicitous. The two counts in that indictment were brought under the Tariff Act, 1922, Section 593(b), 193 U. S. C. 497, charging importation first, and concealment after importation of merchandise. The court

held that the two counts did not charge the same offense, but the statute makes it an offense to bring merchandise into the United States contrary to law, also to conceal it knowing the same to have been brought in unlawfully.

The appellant cites the Supreme Court case of *Morgan v. DeVine,* 237 U. S. 632, 641, as authority for the proposition that where a statute requires proof of the same ingredients in each crime, the accused can be placed in jeopardy but once, although it may be necessary to prove some additional element in order to sustain the second charge. It must be noted that the *Morgan* case does not support the appellant's theory but, on the contrary, supports the entire case of the appellee in showing that the two offenses here were separate and distinct. In that case the appellant was charged with breaking into a post office in the first count, and second that he committed larcency therein. He was convicted under both counts, and was sentenced under each separately. The sentences to run consecutively. The situation was very similar to that of the appellant Arzaga in the present case on appeal. The Supreme Court held that it is within the power of Congress to say what shall be offenses against the law, and that the offense of breaking into a post office and the other of stealing property belonging to it, may be separately charged under the statute and separately punished.

It was held under the Narcotics Drugs Import and Export Act in the case of *Palmero v. United States* (C. C. A. Mass. 1940), 112 F. 2d 922, that importation and bringing into the United States of opium and the concealment of same thereafter constituted separate and distinct offenses.

It was held by this court in *Kramer v. United States* (C. C. A. Cal. 1945), 147 F. 2d 202, that conviction of the offense of importation of opium into the United States and the transportation therein did not bar a conviction of conspiracy to commit such offenses.

POINT III.

Separate and Consecutive Sentences for the Offenses of Illegal Importation of a Narcotic Drug and Concealment After Such Importation Do Not Constitute Double Punishment.

This court considered the precise question of law raised here in the case of *Gargano v. United States* (C. C. A. 9, 1944), 140 F. 2d 118. In that case the appellant was indicted under the same statute as appellant Arzaga, namely Section 174 of Title 21, United States Code. Count One charged he facilitated the transportation of a certain lot of morphine, illegally imported. In the second count he was charged with having concealed the same lot of morphine. He was convicted and sentenced on all counts of the indictment. Long afterward Gargano moved the District Court to vacate and set aside that part of the judgment which sentenced him on Count 2, on the ground that part of the judgment was void because Counts 1 and 2 charged a single offense. The motion was denied and he appealed from the order.

On page 119, the court said:

> "Obviously these counts charged *distinct offenses.* We accordingly hold that appellant's motion was not well founded."

In a more recent case this Court held that an indictment which alleged in one count that defendant dispensed

smoking opium not in or from the original stamped package, and alleged in another count that he concealed and facilitated the concealment of such opium knowing it to have been unlawfully imported, charged two distinct offenses which authorized the imposition of two sentences.

Sorrentino v. United States (C. C. A. Cal. 1947), 163 F. 2d 627.

To the same effect, where the narcotic drug in question was heroin, this Court held the indictment charged two separate offenses and two separate sentences imposed were authorized.

Bruno v. United States (C. C. A. Cal., 1947), 164 F. 2d 693, cert den. 68 S. Ct. 459, 333 U. S. 832, 92 L. Ed. 1117.

In an older case, but in the Sixth Circuit, yet closely parallel to the issue here, it was held in *Gorsuch v. United States,* 34 F. 2d 279 (1929), that the receiving and concealment of smuggled liquor in violation of 19 United States Code, Section 497, also Section 593 of the Tariff Act of 1922, alleged in one count and the transportation of such smuggled liquor to another place, constituted separate offenses. It was further held that separate sentences for such offenses charged under such different counts of an indictment did not constitute "double punishment."

In the case of *Powers v. United States* (C. C. A. 5, 1923), 294 Fed. 512, 514, the Court held the imposition of separate punishments for separate counts was proper. There, the first count charged a violation of The National Prohibition Act, and the second an offense against Customs. Though arising out of *one transaction,* the Court

said they were separate offenses and justified the imposition of separate punishment.

Therefore, it is submitted that appellant Arzaga's contention on this point is without merit.

Conclusion.

Since the questions of law advanced by appellant here have been raised before in this Court and decided adversely, we must conclude that the law is well settled in this jurisdiction on these points. The two counts of the indictment upon which he was charged, convicted and sentenced, constituted two separate offenses, and the imposition of separate sentences constituted no reversible error by the trial court. Appellant was not the victim of double punishment nor was he placed in double jeopardy in violation of the Fifth Amendment to the Constitution. The Court below properly denied the motion to correct Judgment and Sentence, and it is submitted that said Order should be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,

WALTER S. BINNS,
Chief Assistant U. S. Attorney,

RAY H. KINNISON,
Assistant U. S. Attorney,

HERSCHEL E. CHAMPLIN,
Assistant U. S. Attorney,

Attorneys for Appellee.